IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-680

WALL STREET TRANSCRIPT CORPORATION and
RICHARD A. HOLMAN,

Petitioners,

v.

WAINWRIGHT SECURITIES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

RICHARD J. BARNES
220 East 42nd Street
New York, New York 10017
Counsel for Petitioners

Of Counsel:

RONALD S. DANIELS
Townley & Updike
220 East 42nd Street
New York, New York 10017

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-680

WALL STREET TRANSCRIPT CORPORATION and RICHARD A. HOLMAN,

Petitioners,

v.

WAINWRIGHT SECURITIES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

This reply brief is respectfully submitted on behalf of petitioners Wall Street Transcript Corporation and Richard A. Holman in response to respondent Wainwright Securities, Inc.'s ("Wainwright") brief in opposition to the petition for writ of certiorari.

The Issue

This reply is necessary to refocus the issue in light of the prior briefings.* That issue is:

Is a newspaper's right to publish reports of copyrighted *newsworthy* statements entitled to the full protection of the First Amendment or is it a right defined and limited by the copyright doctrine of "fair use".

Put another way, is the right to publish reports of statements which have a tremendous economic impact on the public to be determined by a balancing of private commercial interests, or by the public's right to know.

Respondent concedes and the courts below believed that such material could be published, but that the right to do so must be narrowly circumscribed (because of the existence of respondent's copyright) by the admittedly vague and confining strictures of the fair use doctrine. The fair use doctrine was developed and is appropriate when one is dealing with the usual kind of copyrighted literary or artistic work. But, it is not appropriate when what is involved is a statement which is itself news.

There is no doubt that newspapers are subject to a great many laws and newspapers may infringe the copyright laws in many ways; but a newspaper cannot and does not infringe the copyright statute or any other statute when, as here, it truthfully reports news of public interest direct from the source.

Petitioners do not argue and would not be so presumptuous as to allege, as respondent suggested in its memorandum in opposition to petitioners' application for a stay made to Justice Marshall, at p. 2, "that the Copyright Law is unconstitutional insofar as newspapers are concerned."

* Petitioners' present counsel and his firm were substituted for petitioners' prior counsel after the petition for writ of ceriorari was filed.

Nor do they assert that the copyright laws are wholly prohibited by the First Amendment or that copyright cannot "protect any writing which is made the subject of a news report." (Resp. Br., p. 15). Respondent's characterizations of petitioner's argument, beyond their obvious overstatement of the latter's claims, simply miss the point.

Petitioners' contention is not that the Copyright Act may not constitutionally protect *any writing* which is the subject of a newspaper article.* Rather, they submit that newsworthy statements—statements which are themselves the news by their very nature and their far-reaching impact on the public—may not be protected by the copyright act in derogation of the press' right to publish and the public's right to know.

By failing to recognize the distinction between newsworthy statements and other copyrighted writings, the courts below allowed the private commercial interests of the parties to obscure the First Amendment implications of this case; and have ignored the public interest and the public's right to know.**

This error is particularly egregious given the nature of the material involved and the context of this case. Recent events have emphasized the importance of protecting,

* Petitioners readily acknowledge that where a "writing" is not in and of itself newsworthy, a newspaper is not free to infringe the author's copyright by appropriating the latter's form of expression. Quite obviously, the Transcript could not copy a news account appearing in The Wall Street Journal about a particular broker's report, because The Wall Street Journal's treatment of such a report is not itself the newsworthy event.

** *See Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 754-755 (1976). In the first *Virginia Board of Pharmacy* case, it was the lower court's preoccupation with the commercial interest of the pharmacist plaintiffs and its failure to consider the rights and interests of the public that led to the erroneous result which was corrected only in the second *Virginia Board of Pharmacy* case when there was a proper consideration of the public's right to know. Unlike this case, the first *Virginia Pharmacy* case was not presented to this Court.

indeed encouraging, the freest flow of financial information, and have confirmed the wisdom of past assertions by this Court that the health of our society is directly related to preserving the full freedom of press.

The Case In Context

The results of a survey, made public a week ago,* reveal that individual investors, whose numbers have dramatically shrunk over the years, are "disheartened and puzzled" because they recognize that "objective and timely information" is the lifeblood of prudent investment yet at the same time they, in contrast to the large institutional investors, are "handicapped by a lack of access to timely investment information". Not surprisingly, individual investors, according to the survey, have had to "turn to the press, which they believe is the most unbiased and immediate source of information" to fill the gap.

This plea of the individual investor is neither an entirely new phenomenon nor one expressed only by them. This survey confirms a critical national problem previously recognized by both government and economic experts. In 1974 the Treasury Department issued a special "Public Policy" report which expressed grave concern over the "disarray" of the nation's capital markets which the Treasury Department Report attributed in part to a "loss of public confidence in our securities markets".**

---

* *See* The Wall Street Journal, December 28, 1977, at 10, col. 1-2, reproduced in the appendix hereto, pp. 1-2a.

** *See* Treasury Department paper entitled "Public Policy for American Capital Markets, 1974", relevant portions of which are reproduced in the appendix hereto at pp. 3-4a. As pointed out in Levine, 2 FINANCIAL ANALYSTS HANDBOOK 74 (1975) in a comment written by William E. Chatlos on the Treasury Department Report:

> "Put another way, the average investor simply feels that he cannot compete equitably in the marketplace if he does not have access to the same lexicon of information that his more formidable counterparts do."

As recently as November, 1977, Secretary of the Treasury Blumenthal expressed concern with the weak condition of the nation's equity markets and the enormous erosion in the number of individual shareholders in the last seven years (from 31 to 25 million). The Secretary stressed that this was not "merely a Wall Street problem" but concerned the "health of the economy—and our economic future", and that the crisis was attributable in part to the disenchantment of individuals who feel they cannot compete with the institutional investors.*

The Significance of the Injunction

Thus, the public's right to know, a right always of paramount concern, takes on special significance here. The right to know—the right to publish—the kind of financial news at issue in this case is essential to public belief in the fairness of the equity marketplace and, hence, is essential to the proper functioning of that marketplace and our economic and political institutions. Any bar to the publication of such news will further erode public confidence in those institutions.

The decision below is such a bar. By subjecting, to the strictures of the fair use doctrine, the freedom of the press to publish newsworthy financial information, that decision deprives the public of the free flow of such information. It prohibits the press from fully informing the public and thus helping to maintain the small investors' confidence in the integrity of our political and economic system. Thus, the decision below inhibits the press from performing the very function contemplated by the First Amendment.

If this Court does not grant certiorari because it believes the public's access to such information can be narrowly

---

* *See* Speech of Secretary of the Treasury, W. Michael Blumenthal, on November 21, 1977, reproduced in the appendix hereto at pp. 5-11a.

circumscribed by the fair use doctrine, it will mean, in effect, that a deaf ear has been turned to the groundswell of concern and discontent shared by private citizens and the government alike as to the increasing deprivation of individual investors of meaningful financial and commercial information that is directly affecting their lives.

It will mean more. It will undercut the Government's declared national policy to encourage individuals to participate in our nation's equity markets. The decision below, if allowed to stand, will encourage the belief that the stock market is the playground of the rich and powerful, of the large institutional investors; for that decision has told the public, in plain and simple terms, that despite the fact that brokers' reports are the very events that trigger enormous impact on individual stocks and the entire economy, the public shall not know about them—or if they are to know about them at all, they may only be informed by the press within the confines of the fair use doctrine, as if such information were poetry, or fiction or college textbooks or cartoon characters.* But we are concerned here with none of these. We are talking about written statements of great concern to the public, statements by prominent entities who are writing about publicly-held companies in a way that results in the movement of immense sums of money and has an immediate and direct impact on individual investors and ultimately upon each of us and our economy.

*In support of their argument that the First Amendment is "encompassed" within the fair use doctrine, respondent cites (Resp. Br., p. 9) five lower court decisions, all of which involve either a theatrical or television production, phonograph records, cartoons or educational texts. None of those decisions in any way deal with news matters or newsworthy statements. Nor are the dicta of Justices Brennan and White in *New York Times Co.* v. *United States*, 403 U.S. 713, 726, 731 (1971) (cited at Resp. Br., pp. 12-13) at all relevant, let alone "dispositive of petitioner's argument."

We are talking about news. We are talking about news of immense public concern. We are talking about the press' right to accurately and truthfully report that news, and the concomitant right of the public to learn about it. Either the First Amendment guarantees that right or it does not. If it does guarantee that right, then the only remaining question is whether that right can be limited by the copyright laws. While this Court has never been presented with this precise question before, we submit its prior decisions compel a negative response.

Thus, even if the compelling circumstances revealed by the recent survey and set forth in the Governmental statements did not exist, it would be clear, under this Court's decisions in analogous cases, that the copyright laws cannot limit the First Amendment right of the public to know—or of a newspaper to report—*newsworthy* statements.

The Law

In the past the Court has recognized that the press' First Amendment right to publish truthful reports of newsworthy events cannot be limited by a right of privacy statute. *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). Indeed, excluding urgent questions of national defense, this Court has made clear that the First Amendment does not permit an injunction to issue, under any statute or common law doctrine, which would bar a newspaper from reporting the news. *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971).

It must follow that the copyright statute cannot justify an injunction which bars accurate, truthful news reports. A contrary result would mean that injunctions could issue restraining news reports under privacy statutes or right

of publicity statutes or any similar statute which Congress or the States might enact. There are no public policy considerations which elevate the copyright statute above these other enactments and which would entitle it to the special treatment given it by the courts below.

Petitioners concede that if respondent's statements are not news, this petition should be denied. Respondent, however, has not denied these statements are news, nor can it.

Indeed, respondent's statements are news of the most meaningful sort. It is, of course, axiomatic that powerful people whether in public life or private life make news with their statements. In our free enterprise system, there are many private people whose statements have major impact on the public and on our economy. The public which bears the impact of such statements has an absolute right to know about them.

If a single broker's report issued by one of the nation's leading brokerage houses contains evaluations and conclusions about a major publicly-held company or an entire industry, and makes recommendations as to the investment merits of such corporation or industry which can cause 900 of the major financial institutions to divert hundreds of millions of dollars into or out of the stock of that company or industry, then that broker's report is news. It is news in the purest sense of the word, and every statement in that report is news. It is news because it is an event that triggers a reaction which may, for example, cut in half the market value of stock held by hundreds of thousands of investors, or it may double that value. And it is news because each time these massive movements of capital in our equity markets occur it has both an immediate and long range effect on the well-being and stability of not just the marketplace, but the nation's entire economy. It is

news because the cumulative effect of such broker's reports and the consequent movement of capital ultimately touch virtually every facet of our way of life, from governmental regulation of industry and capital markets to the modest pocketbooks of individual investors scattered throughout the country. Finally, and most important, it is news because the public has a right to know what it is that is motivating these investment decisions, what lies behind these movements of capital which directly affect the public's investments.*

And if one such broker's statement having such repercussions is news, then all such brokers' statements are news. Their newsworthiness is neither increased nor

* That these statements by brokers are news because of their impact on the public, their stocks, our marketplace and our economy has been recognized not only by the press but by experts and by legal authorities as well. Burton G. Malkiel, formerly a member of the President's Council of Economic Advisors and now director of the Financial Research Center at Princeton University, has said that such "brokerage firms specializing in research services to institutions wield enormous power in the market and can direct tremendous money flows in and out of stocks." Malkiel, A RANDOM WALK DOWN WALL STREET 170 (1973). Brokers' reserch reports have been said to be the "dominant rationale" for the stock trading decisions of institutional investors. Klein and Prestbo, NEWS AND THE MARKET 28 (1974). The opinions voiced by the leading industry specialists are "not just market comment; they often are the stuff that makes markets." Rolo and Nelson, THE ANATOMY OF WALL STREET 24 (1968). Not only do the daily newspapers and the business and financial press continually affirm the nationwide economic repercussions that can flow from such reports, but the courts have acknowledged the obligation of the financial press to keep the public informed. *See Reliance Insurance* v. *Barron's*, — F. Supp. — , 3 Med. L. Rep. 1033, 1038-1039 (S.D.N.Y. 1977). These well respected views lend credence to the affidavit submitted below by Myron Kandel, President of the Society of American Business and Economic Writers, that because of their significant impact on the economic and financial community:

> "In fulfilling its obligations to provide the public with comprehensive news and information it is essential for the business and financial press to be able to report on the contents of brokers' reports on a consistent continuing basis."

diminished because one financial newspaper, like The Wall Street Journal or Barron's, may choose to report them on a highly selective basis and another financial newspaper, like The Wall Street Transcript, may choose to report a great number of them. The number of times a newspaper chooses to report a certain type of news—no more than the form, content or style of such reporting—does not determine its newsworthiness.

Just as The New York Times has a regular column entitled "Supreme Court Roundup" which gives brief, accurate, highly condensed summaries of statements issued by the Supreme Court of the United States, so, petitioners, in a regular column entitled "Wall Street Roundup", give brief, accurate, highly condensed summaries of these newsworthy statements by leading brokers. While statements by brokers are routinely reported in the daily and periodical press, The Wall Street Transcript is one of the recognized sources from which individual investors throughout the country can learn about these statements.*

The Key Error Below

The granting and affirmance by the lower courts of an injunction so clearly forbidden by the Constitution and analogous case law can only be attributed to the lower courts' failure to recognize that what was involved here

* The Wall Street Transcript is available to all members of the public by subscription, or through numerous public and academic libraries. Though the Wall Street Transcript is a small newspaper, its availability to the public is clearly nationwide. Professor Paul F. Jessup, of the University of Minnesota, has observed in his book, COMPETING FOR STOCK MARKET PROFITS 15 (1974):

> "Individual investors will find it difficult to obtain directly a wide variety of brokerage-firm research reports over a long period of time. However, this hurdle can be overcome because The Wall Street Transcript and some magazines publish a selection of various reports . . . ."

A list of some 400 libraries across the country where the Transcript is available appears at pp. 31a, *et seq.*, of the appendix hereto.

was a news report of a newsworthy statement. Both courts misconceived both the character of respondent's research reports and the nature of petitioners' news summaries. The courts saw respondent's research reports (a sample of which is reproduced in the appendix hereto, p. 12-21a), as reporting and commenting on facts which may or may not be newsworthy. They did not see respondent's research reports as news *in and of themselves.* As a consequence, they did not see petitioners' news summaries (a sample of which is reproduced in the appendix hereto, p. 22a) as reports of newsworthy events, but rather as a borrowing of someone else's "form of expression" concerning readily available facts. But the lower courts' view missed the point, for it is the research report itself which is the news. *Compare Edwards* v. *National Audubon Society, Inc.,* 556 F.2d 113, 120 (2d Cir. 1977), *cert. denied sub nom., Edwards* v. *New York Times Co.,* 46 U.S.L.W. 3386 (December 13, 1977). It is the opinions, analysis and advice given in those reports which affect the price of individual stocks and directly impact the public stockholders and ultimately the economy. Thus, respondent's research reports were not reports *of* the news—they were themselves the news. It follows that the summaries published in petitioners' newspaper were, in the truest sense, news reports entitled to the full protection of the First Amendment.

Petitioners have conceded that if the research reports do not themselves constitute news, this petition should be denied. There can, however, be no doubt of the newsworthiness of the material involved here. One example should suffice. If Arthur Burns (or his successor) issued a statement which marshalled and analyzed a number of facts (interest rates, employment levels, money supply, etc.) and which contained an opinion based on those facts as to what the rate of inflation might be in the coming month, no one would doubt that his statement was news-

worthy, and that a summary of it (verbatim or otherwise) published by a newspaper would be a legitimate news story. Nor should there be any doubt that if Arthur Burns attached a copyright notice to his statement, the ability of the press to report on it would not in any way be limited, and that would be true if Mr. Burns issued one statement or one each month. No court would suggest that a newspaper would be limited to reporting the underlying facts (interest rates, etc.) and could not print Mr. Burns' analysis and views of those facts because to do so would be to "borrow his form of expression". The brokers' statements here are no different. The marshalling and analysis of facts and the opinions which constitute respondent's statements are no less newsworthy. Petitioners' right to treat them as news is no less clear, and neither that right nor the public's right to know can be eliminated by the decision of respondent to copyright its material.

It was the Court of Appeals' failure to recognize this essential point which led it to believe that petitioners' First Amendment rights must be determined by their ability to meet the criteria of the doctrine of fair use, a doctrine developed and applied in copyright cases where newsworthy statements were not involved, as exemplified by the decisions on which respondent relies. *See* note 1, p. 6, *supra*. Such criteria are completely irrelevant where, as here, the subject matter is itself a newsworthy statement. First Amendment rights to report important news cannot depend on a guess as to how a court might apply a doctrine as vague as fair use. To apply the fair use doctrine to the reporting of newsworthy statements would lead to that dangerous evil of self-censorship so often condemned by this Court.

The Court of Appeals' Misconception of Legitimate Journalism

The application of irrelevant copyright principles led to results which cannot otherwise be explained and in no event can be justified. Thus, the Court of Appeals distinguished news reports in The Wall Street Journal which summarized two of respondent's research reports in a strikingly similar fashion to the way in which they are treated by petitioners, on the ground that The Wall Street Journal published its two news stories a year apart, while petitioners' summaries were published regularly. 558 F.2d at 96. Surely, decisions as to how frequently a class of news should appear in a newspaper is something which must be left to its editor—and his decision on that score cannot be made a test of whether or not his publication of the news is protected by the First Amendment. Such distinctions may be relevant when copyrighted statements which are not themselves the news are in issue, but they are not relevant here.

In like manner, the form and content of the news report cannot be the touchstone of First Amendment protection. *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974). The Court of Appeals, however, felt that petitioners' news reports did not merit such protection because "unlike traditional news coverage, . . . the Transcript did not provide independent analysis or research; it did not solicit comments . . . and it did not include criticism, praise, or other reactions. . . ." 558 F.2d at 96. Putting aside whether the court was correct as to the proper content of news coverage, certainly how a news story is covered and what is included in a news report must be the province of the newspaper. No court should condition First Amendment protection on whether or not news reports conform to that court's concept of what constitutes proper or tradi-

tional coverage. This is especially so when that court's concept of legitimate journalism is so fundamentally wrong, as revealed in the Court of Appeals' statement that:

> "In a parallel manner, the essence or purpose of legitimate journalism is the reporting of objective facts or developments, *not the appropriation of the form of expression used by the news source.*" 558 F.2d at 96 (emphasis added).

No error contained in the opinion below is more egregious than that statement. In the first place, the concept that legitimate journalism does not appropriate the form of expression used by the news source is contradicted by The Wall Street Journal news report quoted in footnote 2 of the Court of Appeals' opinion (which the court implicitly approved as legitimate journalism); for that news report consists *solely* of direct quotations and paraphrases of a Wainwright report. Second, this Court has repeatedly held that once it is determined that a statement or event is newsworthy, the press is free to report that news in any manner it chooses, so long as its coverage is truthful and accurate. *Miami Herald Publishing Co.* v. *Tornillo, supra,* at 256; *Mills* v. *Alabama,* 384 U.S. 214 (1966); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376, 391 (1973). The Transcript's accounts of respondent's statements were unquestionably truthful, accurate and unbiased.

Third, the lower courts' analysis, and respondent's arguments to this Court, disregard the fact that all of the information from the broker's reports which petitioners publish is essential to accurately report those newsworthy statements. To report only the conclusion that a particular research report was either "bullish" or "bearish", without stating how or why that conclusion was reached, is to eliminate precisely that which makes the report newsworthy. The courts below failed to recognize that the conclusions

reached in a broker's report and the reasons for those conclusions are as much the news as the mere fact that he has issued a report. Quotations from, and paraphrase of, the news source is essential to truthful and accurate coverage of the news. As this Court suggested in *Time, Inc.* v. *Pape,* 401 U.S. 279 (1971), when a news report focuses on what someone has said, rather than what they did, "full direct quotation of the words of the source, with all its qualifying language . . ." is the most appropriate means of reporting the newsworthy statement. *Id.,* at 286. *See also Edwards* v. *National Audubon Society, Inc., supra.**

These fundamental errors as to what constitutes legitimate journalism led the court to a conclusion totally unsupported in the record:

> "This was not legitimate coverage of a news event; instead it was, and there is no other way to describe it, chiseling for personal profit." 358 F.2d at 96-97.

Not only is the record, including the District Court's findings, devoid of any support for that statement, the record is clearly to the contrary. Petitioners and respondent are not in competition; each serves different interests for different purposes. The Transcript did not palm off respondent's or any other broker's report as its own work. The Transcript has been published weekly since 1963. It consists typically of 50 to 70 pages of economic, business and financial news and editorial comment.** It was a widely

---

* Direct quotation and paraphrase is precisely the form of reportage utilized by the newspaper in *Edwards.* The Second Circuit deemed it an "exemplar of fair and dispassionate reporting" of what, there too, was a copyrighted newsworthy report. 556 F.2d at 120. This view is shared by journalism scholars. *See, e.g.,* J. Hohenberg, THE PROFESSIONAL JOURNALIST 160-61 (3d ed. 1973); G. Hough, NEWS WRITING 100-09 (1975); G. Mott, NEW SURVEY OF JOURNALISM 103-04 (4th ed. 1968); P. Sheehan, REPORTORIAL WRITING 69-73 (1974).

** Submitted herewith as a separate appendix and as a sample of a typical issue is the December 5, 1977 edition of the Transcript.

used and well-regarded publication long before 1974, when it started the "Wall Street Roundup" column. The typical summary of a broker's report averages less than 5% of the length of the statements issued by such brokers. The Wall Street Roundup column which contains these brief, accurate reports represents less than 15% of petitioners' newspaper, and the news summaries of respondent's reports constituted less than one-thousandth of the particular issues in which the news account appeared.

To suggest that the Transcript is a "chiseler" because it could have, but did not, itself research and prepare financial reports of the kind it reported about, again indicates the court's fundamental misunderstanding of the nature of those reports. The Transcript is a newspaper, not a brokerage house. It does not make the news, it merely reports it; and no research report prepared by it would serve the First Amendment function of informing the public of the impact an influential broker's report may have on a particular company or industry or the economy as a whole. It is respondent and other prominent brokers who, by their own choice, have placed themselves in a position of public importance where their financial statements and market analyses affect millions of people.*

* Respondent's attempt to suggest that it satisfies the public's right to know by stating that "Wainwright's Reports are sold for cash to non-clients" (Resp. Br., p. 4) is quite misleading. In the first place, at no time does Find/SVP inform the public of the availability of reports issued by any named broker, Wainwright or anyone else. Second, its catalogue only lists brokers' reports that are at least three months old. For example, the latest material offered (with no identification as to brokers' names) in Find/SVP's current catalogue (issued in October 1977) is June 1977. Third, these reports are sold for prices ranging from $50 to $325 for a single report. (*See* Appendix hereto, pp. 24-30a.) While respondent does not state the price charged "non-clients" for a typical report, if the distribution through Find/SVP is any indication, it is manifestly clear that these reports are not available in any meaningful way to the public.

The inference that the Wall Street Transcript is simply a "purveyor of institutional research reports in abstract form" (418 F. Supp. at 622) is totally unjustified. In the first place, respondent's incomplete quotation of petitioners' advertisement, upon which the Court of Appeals' unwarranted conclusion was based, fails to call to the Court's attention the fact that petitioners' advertisements, the publication of which long antedated the controversy herein, expressed in bold headlines addressed to the *public*: "You Have a *Right* to Know" and " an urgent need to get this timely news" (*see* appendix hereto, p. 23a). It also fails to point out that the text of that advertisement is not limited to the "Wall Street Roundup" column but also calls attention to other features in the Transcript, and that the reader of the advertisement is urged to "get all this *timely news* in the Wall Street Transcript" (emphasis added) and, in bold letters, that the reader should "ask for it at your Public Library" (*see* appendix hereto, p. 24a).

Moreover, the references in the advertisements to the "Wall Street Roundup" and other features of the newspaper are no different from many newspapers' advertising which highlights special features and columns having interest to certain segments of the public, such as consumers. Nor are they distinguishable from the advertisements of many tabloid newspapers that the reader can read more of the news more quickly in the condensed version of news reporting found in tabloids.

Finally, the fact that The Transcript, including the "Wall Street Roundup" column, is published and sold for a profit does not deprive it of First Amendment protection. *Time, Inc.* v. *Hill, supra,* 385 U.S. at 397, and cases cited therein.

The Court of Appeals' unwarranted and excessive preoccupation with the commercial interest of the Transcript, without regard to its primary function as a news source, led to the kind of analysis disapproved of by this Court in

Bigelow v. *Virginia*, 421 U.S. 809, 826 (1975), quoted in *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 91 (1977), where it was said:

> "Regardless of the particular label ['commercial speech' or otherwise] a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation" (material added).

The danger in such an approach is perhaps best illustrated by the *Virginia State Board of Pharmacy* cases *(compare Patterson Drug Co.* v. *Kingery*, 305 F. Supp. 821 (W. D. Va. 1969) *with Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), *aff'g* 373 F. Supp. 683 (E.D. Va. 1974). The first case involved a challenge to a Virginia statute which prohibited pharmacists from publishing the price of prescription drugs. The statute, when challenged first by certain pharmacists, was upheld by a three-judge federal court. 305 F. Supp. at 827. That case never reached this Court. When later challenged by consumer groups this Court held that the identical statute was unconstitutional because it violated the public's First Amendment right to know commercial information which had a direct impact on their well-being and their finances. In the consumers' suit, the opinions of this Court and the lower court (425 U.S. at 754-755, quoting from 373 F. Supp. at 686) suggest that although the First Amendment had been invoked in the first case, the "commercial" aspects of the pharmacists' case had obscured the First Amendment implications of the Virginia statute. But in the second case where, as here, the challenge was based squarely on the First Amendment, the statute was cast "in a different light". 425 U.S. at 769. The Court held that the statute violated the First Amendment rights of those who wished to publish prescription drug prices and those who needed or wanted to know about such prices.

For purposes of this petition it is unnecessary to compare the relative importance, social value or financial

impact on the public and our economy of publishing prescription drug prices on the one hand and broker's reports which precipitate the movement of hundreds of millions of dollars on the other hand. Suffice it to say that the individual investor's interest and need to know about the latter may, in the words of this Court, "be as keen, if not keener by far, than his interest in the day's most urgent political debate" (425 U.S. at 763) and that society itself "may have a strong interest in the free flow" of such information (425 U.S. at 764).

This Court in *Virginia State Board of Pharmacy* said that the First Amendment made the choice for it as between the beneficial purposes of the Virginia statute on the one hand, and keeping the public in ignorance on the other. 425 U.S. at 769. So too, here, the Court must make a choice between the mandate of the First Amendment to keep the public informed about significant newsworthy matters and an application of the copyright laws which unnecessarily impinges upon that mandate.

The question of when, if ever, the copyright laws can proscribe in any way the reporting of this class of statements which are themselves the news is, petitioners submit, a question of first impression in this Court. It has not been answered by any of the decisions cited by respondent,* nor is its resolution to be found in section 107 of the new Copyright Act.** The question cannot be resolved, peti-

---

* Notably absent in respondent's memorandum is any mention of *Miami Herald Publishing Co.* v. *Tornillo, supra; Time, Inc.* v. *Pape, supra;* or *Edwards* v. *National Audubon Society, Inc., supra,* decisions of far greater relevance to the issue involved here. If respondent's position were sound, it would mean that although the First Amendment would bar a libel claim against the New York Times for the accurate and neutral verbatim reporting of a third party's newsworthy defamatory written statement (*see Edwards* v. *National Audubon Society, Inc., supra*), the New York Times could nevertheless be barred under the copyright statute from publishing that same statement if it were copyrighted as it was in *Edwards*. Petitioners do not believe the First Amendment would tolerate such an anomalous result.

** Section 107 makes only a general reference to "news reporting", and in no way deals with the distinction between a statement the

tioners contend, without consideration of the importance of the public's right to know about these newsworthy statements and of the prior decisions of this Court striking down statutes and common law doctrines where they impermissibly abrogate the press' right to truthfully report the news. *See, e.g., Miami Herald Publishing Co.* v. *Tornillo, supra; Nebraska Press Association* v. *Stuart, supra; Cox Broadcasting Corp.* v. *Cohn, supra; New York Times Co.* v. *United States, supra; Time, Inc.* v. *Hill, supra.* Notably absent in respondent's memorandum is any attempt to reconcile these unambiguous prior holdings with the decisions here of the courts below imposing and affirming restraints on a newspaper indistinguishable from those previously repudiated by this Court.

When weighed against the First Amendment interests asserted by petitioners, the copyright act, permitted but not mandated by the Constitution, can stand on no higher footing than right of privacy statutes, common law libel doctrine or any other legal basis advanced in support of an individual claimant's impermissible attempt to subordinate the press' First Amendment right to truthfully report the news. As this Court has said, deference to "mere labels", in derogation of paramount First Amendment considerations, cannot be countenanced, and that must be true whether that label is "libel", "secrecy" or "copyright."*

---

making of which is itself the news, as opposed to one which, because of the facts contained therein, is newsworthy. Moreover, as respondent notes, section 107 was intended only to codify existing fair use analysis, analysis which heretofore has not focused on the issue framed by this petition.

* As this Court stated in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964):

> "In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law. *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 429. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." (footnotes omitted).

CONCLUSION

This case involves an unprecedented conflict between the First Amendment and the copyright laws. That conflict can be resolved by affirming the earlier pronouncements of this Court holding that the First Amendment takes precedence over statutes which attempt to curtail public access to the news, or it can be resolved by mechanistic resort to the fair use doctrine. The latter course severely curtails public access to information of prime importance; it directly harms the public and, as is the case whenever the free flow of information is restricted, threatens our economic and political institutions. The courts below chose the latter course. Unless this petition is granted and the decision below reversed, First Amendment rights will be significantly diminished and there will be no way to avert the harm to the public and these institutions.

Dated: New York, New York
January 3, 1978.

Respectfully submitted,

RICHARD J. BARNES

Counsel for Petitioners
220 East 42nd Street
New York, New York 10017

Of Counsel:
RONALD S. DANIELS

Townley & Updike
220 East 42nd Street
New York, New York 10017